Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 1077

KENNETH BAER,

*Appellant,*

—*vs.*—

PEOPLE OF THE STATE OF NEW YORK

ON APPEAL FROM THE COUNTY COURT,
ONONDAGA COUNTY, NEW YORK

## JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COUNTY COURT,
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## JURISDICTIONAL STATEMENT

Appellant Baer appeals from the judgment of the County Court, Onondaga County entered September 15, 1965 affirming a judgment of the City Court of Syracuse, leave to appeal to the Court of Appeals having been denied on October 8, 1965. Appellant submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal in that there are substantial federal questions involved.

## OPINION BELOW

The opinion of the County Court, Onondaga County rendered August 12, 1965 is unreported and is printed in Appendix A to this Statement, *infra*, p. 16.

## JURISDICTION

On May 5, 1964 Bernard Bush, a police officer of the City of Syracuse, filed complaint against the appellant alleging that appellant violated Section 38-a of Chapter 16, Article 11 of the Revised General Ordinances of the City of Syracuse. On May 6, 1964 the same Bernard Bush filed complaint against appellant alleging that appellant violated Subsection (2) of Section 722 of the Penal Law of the State of New York. Pursuant to these complaints, the appellant was brought before the Honorable Gordon H. Mahley and tried for such alleged violations. Appellant demurred to the Information charging violation of the aforementioned ordinance for the reasons, among others, that said ordinance violated the First Amendment to the Constitution of the United States of America, by contravening the appellant's right to petition for redress of grievances and that it was unconstitutionally vague in contravention of the United States Constitution.

The demurrer was overruled and the appellant, after hearing before the City Court was found guilty of each charge and sentenced to pay a fine of fifty dollars on each charge.

The appellant appealed to the County Court, Onondaga County on the ground, among others, that the demurrer should have been sustained. The County Court affirmed the judgment of the City Court in an opinion rendered on August 12, 1965.

Leave to appeal to the Court of Appeals was requested of Chief Judge Charles S. Desmond who denied permission to appeal on October 8, 1965.

Notice of appeal from the judgment of the County Court, Onondaga County to the United States Supreme Court was filed with the County Court, Onondaga County, on January 4, 1966.

This appeal is authorized by and taken pursuant to 28 U. S. C. Section 1257(2). The court below held that Section 38-a, Chapter 16, Article 11 of the Revised General Ordinances of the City of Syracuse was not in conflict with the Constitution of the United States, either on its face or as applied to the appellant.

## QUESTIONS PRESENTED

The following questions are presented by this appeal: Whether Article 11, Chapter 16, Section 38a of the Revised General Ordinances of the City of Syracuse is unconstitutional on its face for vagueness and as being in conflict with appellant's rights to speech and to petition for redress of grievances under the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. Whether the application of the ordinance in question violated appellant's rights to speech and to petition for redress of grievances under the First and Fourteenth Amendments to the Constitution of the United States. Whether Section 722 (2) of the New York Penal Law is unconstitutional on its face or as applied to appellant for vagueness and as being in conflict with appellant's rights to speech and to petition for redress of grievances under the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. Whether appellant's conviction in this case violates his rights to speech and to petition for redress of grievances under the First and Fourteenth Amendments to the Constitution of the United States.

## STATUTES INVOLVED

Statutes involved in this case are Section 38-a, Chapter 16, Article 11 of the Revised General Ordinances of the City of Syracuse and Section 722 (2) of the New York Penal Law.

Section 38-a, Chapter 16, Article 11 of the Revised General Ordinances of the City of Syracuse provides:

> 16-38a — USE OF PUBLIC BUILDINGS. The use by the public of all public buildings owned or occupied by the City of Syracuse shall be limited to the conduct of business therein or the carrying on of activities therein for which said buildings shall have been designed, constructed or otherwise designated. No person shall loiter in or around said public buildings nor obstruct corridors, stairways or doorways in any manner so as to prevent free access by members of the public, officers and employees of the City to any such building or buildings or the offices and rooms contained therein. No person shall by his presence or by any means either alone or in consort with others interfere with or interrupt the conduct of the business in the offices located in any such building.

Section 722 (2) of the New York Penal Law provides:

> Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: . . .
>
> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; . . .

## STATEMENT OF THE CASE

Appellant is a member of the Congress on Racial Equality (CORE). In February and March, 1964, CORE was concerned about allegations of police brutality which had been brought to its attention. On several occasions, CORE members demonstrated (Rec. 24, 25, 26). An ordinance was

passed by the Syracuse Common Council, effective March 4, 1964, which limited the "use of public buildings" to "the conduct of business therein or the carrying on of activities therein for which said building shall have been designed, constructed or otherwise designated" and prohibiting loitering, among other acts, in or around such buildings. Two days later, the statute was applied against the appellant. In anticipation of a threatened demonstration, should CORE requests not be honored, the police "had security up in the [police] building and put security on all doors, and only permitted people that had business there to come in" on March 6, 1964 (Rec. 26). At two P.M. that day, appellant went to the top of the stairs of the police station with another member of CORE: Mr. Byron Rushing. The nature of the following conversation is disputed. According to the testimony of the two CORE members, Mr. Rushing asked to see either the Police Chief or his deputy (Rec. 87, 114). According to the testimony of two or the three policemen then on the steps, Mr. Rushing alone or he and appellant both claimed to have an appointment to see the Police Chief which he or they requested to be allowed to keep (Rec. 56, 68). The third policeman present on the stairs did not testify to any conversation between Messrs. Baer and Rushing and the policemen. (Rec. 41). Mr. Rushing thereafter allowed his letter to be taken inside the station and, when told that the chief was not available, announced that appellant would remain to receive a reply. Mr. Rushing left the steps leaving appellant on them. The police instructed appellant to leave; he refused and was arrested.

It is undisputed that appellant was quiet and orderly in his behavior (Rec. 61). It is also undisputed that at the time that appellant was informed that his presence violated the law he and the policemen were apparently the only persons on the stairs (Rec. 117). The stairs thus occupied were

between seven and nine feet wide and consisted of from six to nine steps (Rec. 46). In the course of the conversation begun by instructing appellant that his presence on the police station steps constituted criminal conduct news reporters gathered (Rec. 73). There is no testimony as to the number of reporters or the length of their sojourn on the steps but it appears that they did not constitute a significant threat to orderly ingress or egress since when asked to move they did (Rec. 49). Of the policemen present, only one testified to any persons being thwarted in attempts to leave or enter the station and his testimony merely related that one group of people at one time during appellant's refusal to move approached and then retreated from the station (Rec. 73). Beyond those bare facts, the relation leaves matters to surmise. The policeman himself surmised that they "had business in the section" (Rec. 73) but that they were curious onlookers is as consistent with the facts developed as that they were persons attempting entrance. That they had a purpose more closely related to the conduct of business for which the building was designed, constructed or otherwise designated than did appellant surely nowhere appears.

No other evidence was presented linking appellant to any offensive conduct other than his refusal to leave the steps.

Prior to his trial, appellant demurred to the complaint contending the Syracuse ordinance violates provisions of the First Amendment to the United States Constitution and that it is unconstitutionally vague under the United States Constitution. At trial and on appeal below appellant persisted in this assertion and, additionally, asserted that the ordinance as applied to him and the trial and conviction on either count violated his right to speech, assembly and to petition for redress of grievances under the First Amendment

to the United States Constitution. The courts of New York upheld the Syracuse ordinance and appellant's conviction in the face of these objections.

## THE QUESTIONS ARE SUBSTANTIAL

This case raises fundamental questions of personal liberties which have never been passed upon by this Court. The ordinance challenged creates a penalty for the use of public buildings by unpopular persons wishing to express their views. It is vaguely drafted and so fails to give notice as to the nature of its prohibitions. Its vagueness permits its content to be determined by police regulation and defies even-handed administration.

The ordinance in question also is capable of application in a manner designed to thwart persons in the peaceful exercise of their rights to speech and to petition for redress of grievances. Indeed, that was precisely its application to appellant.

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## POINT I.

**The Syracuse ordinance deprived appellant of his rights under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution since the ordinance is too vague to give notice as to the acts prohibited.**

*Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939) condemns vague penal statutes. Under this ordinance a person's lawful presence in a public building is conditioned on a determination of which activities are activities for which a building is designed, constructed or otherwise designated. It is far from clear whether a police station, for example, is designed, constructed or designated to receive large numbers

of persons simultaneously wanting to register complaints. One wonders whether a building can be designated to receive some but not all forms of complaints and, if so, how a person with a complaint would know whether his presence would fall within proscribed or permitted designation. Similarly, the prohibitions against loitering so as to prevent free access or interfering or interrupting conduct of the business in the offices in such buildings must relate in at least some cases to the disinclination of those in the building to conduct business with the person whose conduct is so characterized. Surely a person with business acceptable to the occupants of the building will not be found a violator although he may prevent access to others by his presence and despite the fact that his conduct may, in fact, interrupt work then being done and that he may interfere with the work until he leaves. How is a person to determine when his business is so unacceptable as to have his presence characterized loitering, the fact that he occupies space in the building characterized preventing access, and his conversation characterized as the prohibited interference or interruption?

The ordinance does not clarify how one distinguishes between the person who by his presence or in consort [sic] with others prevents access by members of the public and the members of the public who are presumably entitled to be present.

The ordinance deprived appellant of his rights under the same Amendments of the United States Constitution in that it does not provide a standard by which to guide officials applying its provisions. The failure to specify a standard for the application of the ordinance to conduct presumptively protected by the First Amendment renders it too vague for even-handed administration. *Kuntz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

"It is clearly unconstitutional to enable a public official to determine which expressions of views will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or as in this case the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute." *Cox* v. *Louisiana*, 379 U. S. 538, 559 (1965). On its face the Syracuse ordinance limits the use of public buildings by citizens to the "conduct of business therein or the carrying on of activities therein for which said building shall have been designed, constructed or otherwise designated" and prohibits loitering and obstructing in violation of that standard. "The statute itself provides no standards for the determination of local officials as to which [acts] . . . to permit or which to prohibit. Nor are there any administrative regulations on this subject . . . " *Cox* v. *Louisiana*, *supra* at 556. As construed by the New York courts in this case, it appears permissible for the police to decide which uses of public buildings appropriately fit the standard. Persons feeling that they have ideas which they are entitled to communicate to public officials must, under the ordinance, first convince policemen that they have lawful business. "A long line of cases in this Court make it clear that a state or municipality cannot 'require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval with the discretion in the police to say that some ideas may while others may not be . . . disseminated (d) . . .'." *Cox* v. *Louisiana*, *supra* at 557, citing *Schneider* v. *State of New Jersey*, 308 U. S. 147 (1939).

As construed in this case the effect of the statute is to allow police to discriminate against persons seeking to exercise their constitutionally protected right to petition government for redress of grievances and free speech. The stat-

ute puts any user of a public building in jeopardy should he feel he has lawful business there, such as to request redress of grievance. While the construction of this statute was limited in the ruling on the demurrer to users who "obstruct", it should be noted that the statute was held validly applied in this case to the presence of a single individual. When he was informed he was obstructing the police station in violation of the ordinance, Mr. Baer's only act of "obstruction" was his presence on the police station steps in which he claimed to be the pursuance of a lawful objective.

At its best the ordinance in question allows, as in this case, the use of its sanction to cordon off from public authority those who would protest against the form of public action. At worst, the ordinance is designed to accomplish that purpose. The record discloses that the ordinance was passed during a time of protest by a civil rights organization. It was applied to the appellant two days after its passage by persons who knew that he was a member of the protesting organization.

Surely if streets are natural and proper places for the dissemination of information and opinion, *Schneider* v. *State of New Jersey*, 308 U. S. 147 (1939); *Hague* v. *CIO*, 307 U. S. 496 (1939), when the audience to be reached is the general public, public buildings must be the natural and proper places in which to express opinions and petition for redress of grievances to public officials. *Cf. Edwards* v. *South Carolina*, 372 U. S. 229 (1963). A municipality cannot selectively close such a natural and proper place for the exercise of first amendment rights with imprecise legislation which depends for its enforcement on police interpretation. *Cox* v. *Louisiana*, 379 U. S. 536, 559 (1965); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Hague* v. *CIO*, 307 U. S. 496 (1939).

## POINT II.

**Appellant's rights under the First and Fourteenth Amendments of the Constitution of the United States were violated by the application of the Syracuse ordinance in this case.**

The arrest in this case was the ultimate result of a preconceived plan designed to prevent access to the police station by appellant or other persons of his persuasion (Rec. 26). The police station remained open for persons deemed by the guarding policemen not to be "unauthorized" and to have "business" at the police station. (Rec. 28). Others were to be allowed to go into the station with complaints. (Rec. 30). Persons who wanted to demonstrate, whatever that means, were to be kept out. (Rec. 30-31). Some persons were admitted. Rec. 40, 72). Petitioner was not. (Rec. 55, 88).

Even the steps of the police station were soon closed to the appellant. He was, according to the prosecution testimony, told that his refusal to obey an order to move would cause his arrest under the New York Penal Law and the Syracuse ordinance in question. No issue of intertwining speech, assembly and petition rights with conduct which may be prohibited is here in issue since the appellant was not engaged in picketing, encouraging the commission of a crime or uttering "fighting words." Indeed, the offensive conduct of which appellant was guilty at the time he was told that he violated the Syracuse ordinance was his own presence on a large stairway. (Rec. 117). Appellant was peaceful, courteous and orderly but adamant in his refusal to move in the face of police orders. Such conduct was, according to the New York Courts, sufficiently obstructive to authorize conviction under the Syracuse ordinance. "There was no . . . 'obstructing' here, unless petitioner's presence . . . was

itself enough. Failure to obey such an order, when one is not acting unlawfully, certainly cannot be made a crime in a country where freedom of locomotion (Edwards vs. People of the State of California, 314 U. S. 160, 62 S. Ct. 164, 86 L. Ed. 119) is honored." Mr. Justice Douglas concurring in *Shuttlesworth* v. *City of Birmingham*, 86 S. Ct. 211, 216 (1965). If the presence of 1500 boisterous demonstrators in *Cox* v. *Louisiana*, 379 U. S. 536 (1965), and a crowd of 200 students plus 200-300 onlookers in *Edwards* v. *South Carolina*, 372 U. S. 229 (1963) do not constitute a sufficient threat to public safety to warrant municipal interference surely appellant's isolated presence under these circumstances cannot.

It would appear irrelevant that once the police informed appellant he had violated the law and he responded by asserting his right to remain, newsmen gathered. Since the police order was invalid any resultant disturbance more directly relates to the unlawful act of the police than the lawful act of the appellant. In any event, the police orders cannot make lawful conduct unlawful. "One cannot be punished for failing to obey the command of an officer if that command is itself violative of the constitution." *Wright* v. *Georgia*, 373 U. S. 284 (1963), 290-291; *Henry* v. *City of Rockhill*, 376 U. S. 776 (1964).

Even charging appellant with responsibility for the reporters who joined him and the police on the steps would not add greatly to the evidence of obstruction, since the reporters, as soon as asked, left the stairway. (Rec. 49).

Only "when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears" may the state interfere with first amendment rights. *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1940). The facts invoking the application of the Syracuse ordinance in this

case surely do not rise to such a standard. See *Shuttlesworth* v. *City of Birmingham*, 86 S. Ct. 211, 216 (1965), concurring opinion of Mr. Justice Douglas, concurring opinion of Mr. Justice Fortas.

## POINT III.

**Section 722 (2) of the New York Penal Law deprived Appellant of his rights under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution since the statute on its face and as applied to Appellant was too vague to give notice as to the acts prohibited.**

For the reasons mentioned in point I and II, appellant cannot constitutionally be punished for the conduct in question. This is at least as true under provisions of section 722 (2) of the New York Penal Law as under the provisions of the ordinance of the City of Syracuse. Indeed, the Penal Law provision in its breadth is more suggestive of the vice in *Cox* v. *Louisiana*, 379 U. S. 536, 559 (1965), than is the Syracuse ordinance. It appears to apply even fewer relevant standards to the punishment of conduct such as the appellant's. In any event, the conviction under the Penal Law is merely an alternative form of sanction for the conduct already punished under the provisions of the Syracuse ordinance.

## POINT IV.

### Appellant's conviction in this case violates his Constitutional rights under the First and Fourteenth Amendments to the United States Constituion.

The arrest of appellant in this case constitutes prior restraint on the exercise of his right to petition government for redress of grievances and his right of free speech. See *Kuntz* v. *New York*, 340 U. S. 290 (1951), *Niemotko* v. *Maryland*, 340 U. S. 268 (1951), *Saia* v. *State of New York*, 334 U. S. 558 (1948).

Some difficult questions remain unresolved concerning the limits of a person's rights to petition government. See generally Brown, *The Right to Petition: Political or Legal Freedom*, 8 U. C. L. A. L. Rev. 729 (1961).

It is clear that the right to petition government for redress of grievances is made applicable to states by the 14th amendment to the federal constitution *DeJonge* v. *Oregon*, 299 U. S. 353 (1937) and that it is a right additional to the right of free speech and of assembly. *Cf. Edwards* v. *South Carolina*, 372 U. S. 229 (1963). Further, it would appear to include the right personally to present the petition. *Cf. Edwards* v. *South Carolina*, 372 U. S. 229 (1963). Governor Brown's suggestion that a duty to consider petitions must be inferred from the right to petition to save it from being a redundant articulation of speech and press rights, Brown, *The Right to Petition: Political or Legal Freedom*, 8 U. S. L. A. L. Rev. 729, 732, 733 (1961), seems persuasive. Without so holding, one might still agree that, as a minimal application of the right to petition, a petitioner be afforded the opportunity to assure himself that the public official petitioned or someone authorized by that official to read petitions has received the complaint.

In this case appellant was denied even the opportunity afforded citizens using the police station for purposes which, for all that the record discloses, are constitutionally unprotected. He was denied entry with his letter and arrested when he insisted on awaiting a response from the addressee.

## CONCLUSION

It is submitted that the issues in this case are of great importance to persons seeking to give expression to their grievances and seeking to petition for redress of grievances.

Respectfully submitted

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# APPENDIX A

## Opinion of County Court, Onondaga County

COUNTY COURT — COUNTY OF ONONDAGA

THE PEOPLE OF THE STATE OF NEW YORK

— *vs.* —

KENNETH BAER

Appearances:

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GALE, J.

MEMORANDUM

This is an appeal from a City Court conviction of one Kenneth Baer for violation of Section 722 (2) of the New York Penal Law and Section 38-a, Chapter 16, Article 11 of the Revised General Ordinances of the City of Syracuse. There are three grounds urged on this appeal.

1. The Court erred in not sustaining a demurrer to the information charging a violation of the City Ordinance on the ground that the Ordinance was unconstitutional. The defense relies very heavily on the case of *People* v. *Diaz*, 4 N. Y. 2d, 469. Therefore, since the Court of Appeals in that case held that a Dunkirk City Ordinance was unconstitutional in that the language was too vague, indefinite and uncertain to define a crime, the language of that Ordinance should be compared with the Ordinance in the case at bar. The section under attack in the Dunkirk Ordinance provides:

> "No person shall lounge or loiter about any street or street corner in the City of Dunkirk."

The Court of Appeals struck down the Dunkirk Ordinance on the ground "it makes no distinction between conduct cal-

culated to harm and that which is essentially innocent." *People* vs. *Diaz, supra,* at p. 471.

The Court also stated that a statute was upheld when the term *Loiter was coupled with a prohibited act,* in order to give significance to the word loiter, "Any person . . . with intent to provoke breach of peace, or whereby a breach of peace may be occasioned . . . congregates with others on a public street or refuses to move, . . ." was used as an example of a valid provision. (Emphasis supplied)

The Syracuse Ordinance provides: "no person shall loiter in or around public buildings or obstruct corridors, stairways or doorways, *so as to prevent free access by members of the public, officers or employees.* No person shall by his presence or by means either alone or in consort with others *interfere with or interrupt the conduct of business* in the offices located in any such buildings." (Emphasis supplied)

This statute does *not,* as in the Dunkirk Ordinance, provide that no person shall lounge in or loiter about any public building. Loiter "is coupled with prohibitive conduct," namely, preventing free access of corridors, stairways or doorways, and interfering with or interrupting the conduct of business. There should be no difficulty with the word "loiter", "loitering is a word in common usage, whose meaning is well understood . . ." *People* v. *Bell,* 306 N. Y. 110, 113. The language is not such as can be said not to distinguish "between conduct calculated to harm and that which is essentially innocent." A person who prevented free access or interrupted or interfered with the conduct of business would not be doing so innocently, whereas, a person who has business in the building could freely come and go or wait and would not violate the statute.

As the Court of Appeals pointed out in *People* v. *Bell, supra,* public buildings are used by the public and danger could arise from the "congregation of nondescript charac-

ters" and "easily become anything from a public nuisance to a serious menace." However, prohibiting such harmful conduct does not prevent persons from being in a public building, who have a valid reason to be there. At the same time, by prohibiting acts which would obstruct corridors, stairways and doorways, the end result would be to prevent a situation that could be dangerous in time of fire or explosion or panic, which is, of course, well within the police power of a municipality. As to the second prohibition, the end result is to promote the conduct of public business for which the public building was designed and to prevent interference therewith, thereby promoting the public welfare of those who need the services provided within the building. The Supreme Court of the United States has recognized the necessity of governments to establish reasonable regulations with regard to public facilities. *Cox* vs. *State of Louisiana*, 85 Sup. Ct. 453, 464.

> "Appellant, however, contends that as so construed and applied in this case, the statute is an unconstitutional infringement on freedom of speech and assembly. This contention on the facts here presented raises an issue with which this Court has dealt in many decisions. That is, the right of a State or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use and the concomitant right of the people of free speech and assembly." (The Court citing many cases omitted here.)

The ordinance does not prohibit, as Defendant contends, the right to petition or to publicly demonstrate. The record reveals that picketing was being conducted in a peaceable manner and without interference on the part of the police authorities in the immediate vicinity of the public building in question. This must be contrasted with the *Cox case; supra,* where the whole issue turned on the right of the police

to interfere with a public assemblage where there was doubtful evidence of anything but an exercise of constitutional rights. Another distinction is the statute itself. In Cox, the Court held that it was unconstitutionally vague in its overly broad scope. "The statute itself provides no standards for the determination of local officials as to which assemblies to permit or which to prohibit. *Cox* v. *State of Louisiana*, supra, at p. 465.

This Court believes that the standards under the Syracuse Ordinance established definite guide lines, using language approved by our courts, and cannot be construed as vague or directed toward prohibiting innocent public assembly. The discretion vested in the police officers was not such as to provide them with no standards for enforcement. The duty of police officers "is . . . to protect persons from threatened wrong and to prevent disorder . . . Reasonable discretion, must, in such matters, be left to them . . . " *People v. Galpern*, 259 N. Y. 279, 281-82.

The presumption of validity in the enactment of the ordinance has not been overcome nor has the presumption of its inherent constitutionality. *People* v. *Bell*, supra; *Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215.

Another ground urged as a basis for relief is that the People failed to prove the Defendant was guilty beyond a reasonable doubt. However, from the record of trial testimony, the following facts appear: It is undisputed that the Defendant came to the Police Station on West Willow Street, which at that time consisted of Police and Traffic Courts, the Traffic Violation Bureau and the jail area, and that he requested to see Chief Murphy, who was out at the time. The Defendant was advised that he should make an appointment at some other time to see the Chief. Because of the anticipated demonstrations certain security measures had been taken with respect to the building; only those per-

sons who had business within the building were allowed to enter. There is contradictory testimony as to the conduct of the Defendant after he was advised Chief Murphy was out. One police officer by the name of MacDonald stated that the Defendant insisted upon remaining on the stairway until he received a reply from a letter to Chief Murphy, and that he was advised to move off the steps or he would be in violation of the law. (See record, page 42). Officer Bush testified that the Defendant was advised to evacuate the stairs and move down to the sidewalk, (See pages 58 and 59 of the Record), and also that the Defendant insisted upon moving around on the stairway (See page 61 of the Record). Officer Surace testified that he saw people approaching the building as if to enter and when they saw the comotion caused by the combination of the Defendant's conduct and the newspaper reporters and photographers who had congregated, they left. (See page 73 of the Record.) He also testified that the Defendant was moving back and forth across the width of the stairway. (See page 74 of the Record). The Defendant on the other hand, while he admitted that he refused to move off the stairway, stated that he was not in anyone's way and that most of the time he stood at the side of the stairway. From all the evidence, the trial judge having had an opportunity to observe all the witnesses on direct and under cross-examination, could have found that the Defendant was guilty of violating the City Ordinance, Sec. 38-a, beyond a reasonable doubt. The decision of the trier of the facts, under these circumstances, should not be disturbed unless it is clearly unsupported by the weight of evidence. (*People* v. *Farrell*, 2 A. D. 2d, 284). In the case at bar there is such evidence.

All of the police officers testified that the Defendant was requested more than once to leave the stairway and go down to the sidewalk or they would have to arrest him for ob-

structing a public entrance. As pointed out in *People* v. *Thorpe*, 198 Misc. 462:

> "the police officer's admonition was a 'useful precaution to avoid possible disturbance' (*People* v. *Galpern*, 259 N. Y. 279, 284). "The defendant's refusal to accede to the request of the police officer and the defiance and disregard of his instructions were calculated 'to annoy, disturb, interfere with, obstruct or be offensive to others' within the purview of subdivision 2 of Section 722 of the Penal Law. *People* v. *Thorpe*, supra, at p. 466.

Furthermore the Court pointed out in *People* v. *Ripke*, 115 N. Y. S. 2d, 590, at page 593:

> "the statute does not itemize the particular acts that constitute disorderly conduct. The cases listed under this Statute are many and varied. A breach of peace may be caused or threatened by acts as well as words. It may frequently happen that an isolated act may constitute a more serious threat to a breach of peace than defamatory words."

In the case at bar, if the Court believed the testimony of the police officers, it could have found that the Defendant deliberately refused to obey the officers orders to move down to the sidewalk. Under the foregoing cases, his conduct upon the stairway and refusal to obey the reasonable police order was such as to violate Section 722, subdivision 2 of the Penal Law. This case appears analogous to that of *People* v. *Galpern, supra,* where while a different statute was involved, the Court of Appeals pointed out that police officers directions were intended to preserve public order (*People* v. *Galpern, supra,* p. 284) and "failure even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of peace." *People* v. *Galpern, supra,* at p. 282.

The final ground urged by the Defendant is that his con-

stitutional rights of assembly, free speech and petition are violated by the conviction. This Court in its decision as to the other two grounds urged by the Defendant has shown indirectly how the above contentions are not true. As pointed out previosuly, the rights of the entire group to picket were not interfered with. There was testimony that people who started toward the building, turned away when the Defendant was on the stairs. The was not a situation, as in *People* v. *Galpern, supra,* at page 284, where the defendants were momentarily on the sidewalk after having attended a meeting. In the case at bar, the demonstration which the Defendant engaged in was preconceived, planned and publicly announced prior to its occurrence. The police officers had reason to believe that a breach of the peace was occurring. The statutes in question were designed to protect the citizens of the community. Governmental influence over the freedom of a single individual must be weighed against the freedom which extends to all citizens. An individual's rights are not such that they can infringe upon those of his fellow citizens or interfere with the normal processes of government. The conclusion of this Court is therefore that the Defendant's constitutional rights of assembly, petition and free speech were not violated.

For the foregoing reasons, the judgment of conviction is affirmed in all respects. Submit order accordingly.

Dated at Syracuse, N. Y.
August 12th, 1965

ORMAND N. GALE
Onondaga County Judge

## APPENDIX B.

### Final Order of the County Court, Onondaga County.

At a Term of the County Court held in and for the County of Onondaga, at the Court House in the City of Syracuse, New York, on the 12th day of August, 1965.

Present: HONORABLE ORMAND N. GALE,
Onondaga County Judge.

COUNTY COURT — COUNTY OF ONONDAGA

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THE PEOPLE OF THE STATE OF NEW YORK

— *v.* —

KENNETH BAER,

*Appellant.*

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An appeal having been taken to this Court by the defendant-appellant from a City Court conviction for Violation of Section 722 (2) of the New York Penal Law and Section 38-a Chapter 16, Article 11 of the Revised General Ordinances of the City of Syracuse; and the said appeal having been argued by Faith A. Seidenberg, Esq., attorney for the appellant, and Francis R. Moran, Esq., District Attorney of the County of Onondaga, attorney for the People, and due deliberation having been had thereon, it is hereby

ORDERED that the judgment of convitcion so appealed from be and the same hereby is affirmed in all respects.

ENTER

ORMAND N. GALE,
Onondaga County Judge

Dated: Syracuse, New York,
September 15, 1965.

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END